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Supreme Court of the United States

OCTOBER TERM, 1952

No. 687

JULIUS ROSENBERG and ETHEL ROSENBERG,

Petitioners,

vs.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING

JOHN F. FINERTY,
Attorney for Petitioners.

Supreme Court of the United States

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There would seem to be only one rational explanation for the denial by the majority of the Court of the petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. What this explanation may be can only be deduced by the elimination of grounds for denial which, it would seem, cannot be reasonably imputed to the majority.

Counsel will not impugn the intelligence of any member of the majority of this Court by assuming that any member could possibly accept as true the fantastic and inherently incredible testimony of Government's witness David Greenglass that, in September, 1945, he was able to furnish and transmit to the defendant Julius Rosenberg a substantially accurate drawing of a cross-section of the Nagasaki atom bomb, together with twelve pages of written material descriptive of its component elements, their action and inter-action, and the principles of operation of that bomb; and further, that five years later he was able to produce, wholly from memory and without aid from any other source, as impounded Government Exhibit

8, a substantial replica of such drawing of a cross-section of the Nagasaki atom bomb, and a paraphrase of such descriptive material as represented by Greenglass' untranscribed testimony.[1]

Neither will counsel imply such disrespect to any member of the majority of this Court as to suggest that any member had not read at least the resume of Greenglass' testimony in the foregoing respects presented in the petition for certiorari.[2]

Furthermore, counsel will not impute to any member of the majority of this Court the rejection of the truth of the affidavits of Dr. Kaiser, now a member of the British

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[1] While Greenglass' testimony with relation either to the alleged original production by him of the drawings of the *lens molds*, or their reproduction as represented by Government's Exhibits 2, 6 and 7, is not as inherently incredible as is his testimony as to Government Exhibit 8, the cross-section of the Nagasaki atom bomb and the untranscribed descriptive material relating thereto, it has already been noted that, had the jury known this latter testimony to be perjured, they undoubtedly must have considered Greenglass' entire testimony impeached.

It will also be noted that the hysterically proclaimed "crime worse than murder", on the basis of which the trial judge undertook to justify the death sentences which he imposed upon the Rosenbergs (C. R. 1614), was a crime for which the Rosenbergs were never indicted, tried or convicted—the actual transmission to the Soviet of the secrets of the atom bomb as comprised by impounded Government Exhibit 8 and Greenglass' untranscribed descriptive material relating thereto. There is not the slightest indication that even that Judge would have imposed such sentences for the mere transmittal to the Soviet Union of drawings of a minor portion of that bomb, the lens molds, as comprised by Exhibits 2, 6 and 7, aside from the fact that, again, the Rosenbergs were never indicted, tried or convicted for the actual transmittal of any such material.

[2] For the convenience of the Court, counsel has re-abstracted Greenglass' testimony in the foregoing respects in the Appendix to this supplemental brief. It will be noted that the nature of this perjured testimony is such that it could not have been innocently used by the prosecutor. Counsel respectfully suggests that after reading such testimony of Greenglass, no member of the majority could have the temerity to avow belief in its truth.

Atomic Commission (R. 119-121)* and of Dr. Hadamard, a distinguished French atomic scientist (R. 121-123), that it is inconceivable that Greenglass, with his total lack of scientific training and of opportunity to have obtained the necessary information, could have originally produced, in September, 1945, a cross-section of the Nagasaki atom bomb and twelve pages of such descriptive material, and five years later to have reproduced them on trial, wholly from memory and without aid from any other source, in impounded Government Exhibit 8 and in Greenglass' untranscribed testimony relating thereto. To do so would impute to the members of the majority of this Court the acceptance of the wholly fallacious and spurious grounds which the District Attorney succeeded in imposing upon the District Court as its basis for rejecting the truth of such affidavits.

These grounds were, that since the affiants had not observed Greenglass when he testified, and had seen neither impounded Government Exhibit 8 nor Greenglass' untranscribed testimony relating thereto, they were not qualified to form an opinion as to Greenglass' memory (R. 18). As pointed out pages 2-3 of defendants' reply to the Government's brief in opposition, the fundamental basis of those affidavits was Greenglass' lack of scientific capacity, and not of memory. It was obviously unnecessary for atomic scientists, of the standing of the affiants, either to have heard Greenglass' untranscribed testimony or to have seen impounded Government Exhibit 8, in order to know that Greenglass lacked the scientific capacity to have originally produced, or later to have reproduced, either without aid from other and undisclosed sources.

Neither is counsel willing to assume that any member of the majority can believe that the question of Greenglass'

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*The designation (R. ....) refers to the transcript of record herein. Where the designation (C. R. .....) is used, it refers to the transcript of record in the criminal proceedings before this Court on the original petition for certiorari in Docket 111, October Term 1951.

perjury was concluded by the verdict of the jury, by the affirmance of that verdict by the Circuit Court of Appeals, and by the original denial of certiorari by this Court. No such question was or could have been presented either to the jury or to the courts on review. Any question even of the credibility of Greenglass' testimony in this respect was excluded from the jury by the refusal by the Trial Court to permit Government's atomic witness Colonel Derry to express an opinion as to the credibility of such testimony (C. R. 916).[3]

Finally, in this connection, counsel would not impute to any member of the majority of this Court a lack of recognition of the significance of the Government's failure to offer any affidavits in rebuttal of the affidavits of Dr. Kaiser and Dr. Hadamard with reference to Exhibit 8 and Greenglass' untranscribed testimony relating thereto, although the Government had available to it, as shown by its submitted list of witnesses on trial (C. R. 51-52), the three leading atomic scientists of this country: Dr. Harold C. Urey, Dr. George B. Kistiakowski, and Dr. J. Robert Oppenheimer. Plainly the Government knew that these atomic scientists could not be brought to deny the truth of the affidavits of their fellow scientists, Dr. Kaiser and Dr. Hadamard.

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[3] It is to be noted that the opinion of the Circuit Court of Appeals rejects the affidavits, not only upon the fallacious grounds on which they were rejected by the District Court, but specifically on the ground that "the affidavits bear solely upon the credibility of his (Greenglass') testimony and that issue was properly submitted to the Trial Jury for decision (R. 36). It has, however, been repeatedly noted, both in the petition for certiorari and in the defendants' reply to the Government's brief in opposition, that opinion of the Circuit Court of Appeals undeniably shows that, incredible as it may seem, *that Court did not even know that any question of perjury as to Exhibit 8, the cross-section of the Nagasaki atom bomb,* and Greenglass' untranscribed testimony relating thereto, *was presented by defendants' Section 2255 petition,* but clearly assumed that the only questions of perjury presented were as to Greenglass' perjury in connection with Exhibits 2, 6 and 7, the drawings of the lens molds (R. 335-336).

Under such circumstances it would seem fair to deduce only that the majority are, on some undisclosed and possibly unreasoned grounds, sincerely convinced that even if Greenglass' testimony in the foregoing respects is perjured, the Rosenbergs are, nevertheless, guilty.[4] Therefore, the majority may well believe that certiorari should not be granted, since this would result not only, from their point of view, in useless open argument before this Court of the question of Greenglass' perjury, but, if followed by public hearings on retrial, might involve, likewise from their point of view, useless disclosures, which nevertheless might shake the confidence of the people of the United States and of the world in the administration of justice in this country. Patriotic as may be the motives of the majority in this respect, the preservation of Government prestige at the expense of the rights, and here, of the very lives of accused persons, is more consistent with the principles of totalitarian than of democratic society.

If counsel wrong the majority in this respect, the blame lies with the majority in refusing to apply to the Federal Courts the sound and historic principles laid down by this Court for the governance of state courts in the treatment of perjury (*Mooney* v. *Holohan*, 294 U. S. 103).[5]

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[4] In this connection it is to be noted that the Court of Appeals, in its original opinion confirming the conviction of the Rosenbergs, expressly held that the conviction of the Rosenbergs could not stand if Greenglass' testimony were disregarded (C. R. 1648).

[5] It seems doctrinaire in the extreme for Mr. Justice Frankfurter to suggest in his notation in connection with the denial of the original petition for certiorari, and to repeat that suggestion here, that the only significance of such denial is that petitioners could not muster four votes in favor of granting the Writ. The practical significance of the denial here is to take the lives of the petitioners on perjured testimony.

Moreover, it is to be noted that the rigid adherence to the "four vote rule" stultifies the representations originally made by the late Mr. Justice Vandevanter to the Congress in 1924 as to the liberality which which the Court would exercise its discretion in issuing certiorari in death cases, such representations being repeated by the late Mr. Chief Justice Hughes to the Congress in 1937. (See Coun-

Counsel, for his part, believes that nothing could better serve to restore universal confidence in this country's administration of justice than the courageous exposure and rebuke by this Court of the shameful maladministration of justice by the District Attorney, by the Department of Justice, and by the lower courts, which has attended the whole course of the prosecution of the Rosenbergs.[6]

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sel's brief of November 7, 1938 in support of petition for rehearing in *Thomas J. Mooney* v. *Court W. Smith*, Warden of San Quentin Penitentiary, California, No. 6, October Term, 1938, pp. 1 to 24.) While such brief specifically concerns review of judgment of state courts, the representations of the Court to the Congress were not so confined.

Finally, it is inconceivable that Mr. Justice Frankfurter can consider his observations in connection with denial of the Rosenbergs' original petition for certiorari, as to the care with which the Court of Appeals scrutinized that record, to have any application to the denial of their present petitions. One and, indeed, the primary ground of the instant petitions for certiorari is the shocking negligence of the Court of Appeals in failing to examine the Section 2255 record sufficiently to understand that even such petition, and the affidavits attached thereto, alleged any perjury whatever in Greenglass' testimony with reference to impounded Government Exhibit 8, the cross-section of the Nagasaki atom bomb, and Greenglass' untranscribed testimony relating to that exhibit. (See pp. 35-38 of the instant petitions for certiorari, and pp. 1-3 of petitioners' reply brief to the Government's brief in opposition.)

[6] This maladministration has reached even into the recent clemency proceedings before the President. The Trial Judge expressly conditioned the original stay of execution of the Rosenbergs on the condition they would not use such stay to seek further judicial review of their conviction. Thereupon, counsel signing this supplemental brief, who had not yet become counsel for the Rosenbergs, advised the Deputy Attorney General of the facts as to Greenglass' perjury, as shown by Greenglass' own testimony and the affidavits of Dr. Kaiser and Dr. Hadamard. Counsel further warned the Deputy Attorney General that the President should not be embarrassed by prematurely passing, one way or another, on such application for clemency, since further judicial remedies were available. The Deputy Attorney General curtly rejected counsel's representations in the foregoing respects, and counsel is informed that the President passed upon the original application for clemency without the information furnished by counsel to the Deputy Attorney General being made available to him.

Whether or not this Court is aware of it, confidence in the administration of justice by the Department of Justice and the Federal courts in cases of this nature is already badly shaken both at home and abroad. Even the Court of Appeals rebuked the Department of Justice as represented by the District Attorney in "timing" the Perl indictment so as to influence the jury upon the trial of the Rosenbergs (R. 334). It is not without significance that the Department of Justice has so far lost all sense of propriety that it permitted the District Attorney to bring on the trial of Perl upon such indictment at the very time that these petitions for certiorari were pending before this Court, although the District Attorney had resisted Perl's repeated efforts to bring the case to trial during the two preceding years. Counsel does not mean to suggest that the "timing" of Perl's trial in any way influenced this Court in its disposition of the Rosenbergs' present petitions for certiorari. Any prosecutor should have been on guard against any act which might have been susceptible of the implication that such influence was intended.

If this Court permits this and worse improprieties by the Department of Justice in the Rosenbergs' case to pass unrebuked, and if the majority persist in their determination not to permit review in open court of whether or not Greenglass' testimony was perjured, this Court will have only itself to blame if "justice under the law" becomes a term of derision.

Finally, if the Rosenbergs are permitted to be executed while the slightest doubt of the truth of Greenglass' testimony persists, and until the truth or falsity of that testimony is fairly determined in open court, this Court will have done greater and more lasting disservice to this country than could the Rosenbergs, had they in fact committed the "crime worse than murder" for which they have been sentenced to death, and of which they are unquestionably innocent—the actual transmission to the Soviet of the secret of the atom bomb.

Counsel signing this supplemental brief in support of the petition for rehearing has prepared it while his fellow counsel have been engaged in preparing the petition itself, and in certain phases of other proceedings on behalf of the Rosenbergs. This supplemental brief is, however, submitted with his full authority and approval.

Respectfully submitted,

JOHN F. FINERTY,
Attorney for Petitioners.

APPENDIX

Summary Analysis of Greenglass' Perjury in His Testimony in Connection with Impounded Government Exhibit 8, a Sketch of a Cross-Section of the Nagasaki Atom Bomb and His Untranscribed Testimony Descriptive of That Exhibit

Greenglass testified (C. R. 395)[1] that he was born on March 3, 1922, presumably in New York. That after graduation from high school he attended Brooklyn Polytechnic for six months and later Pratt Institute for a semester and a half to prepare himself to be a machinist. These were his sole educational qualifications shown on direct examination (C. R. 396).

On cross-examination he admitted (C. R. 610-611) that he had failed in all eight courses at Brooklyn Polytechnic, but stated, with apparent pride, that he did not fail any courses at Pratt Institute but got good marks. He also admitted (C. R. 612) that he never studied engineering, differential or advanced calculus, thermodynamics, nuclear or atomic physics, or quantum mechanics. In answer to the question whether he knew anything about the basic theory of atomic energy, he answered, "I know something about it, yes, I am no scientific expert, but I know something about it." He did not further define what he did know about "it".

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[1] The incredible confusion and diffusion with which Greenglass' testimony was presented by the prosecutor makes it impractical within the necessary limitations of a petition for certiorari to furnish record citation for all the statements made in this summary of Greenglass' testimony. Such citations are, therefore, necessarily limited to the most vital items of that testimony. Counsel, however, give their assurance to this Court that such summary is a fair representation of Greenglass' testimony.

Counsel believe, moreover, that an examination of the record would demonstrate that the confused manner in which Greenglass' testimony was presented was a device deliberately adopted by the prosecutor to conceal the inherent improbability of that testimony, and that such device was most successful.

This is the sum total of Greenglass' educational qualifications as shown of record.

Greenglass testified that prior to entering the Army in 1943, he had practical experience as a machinist. That, after basic training, he was first assigned to the Ordnance School at Aberdeen, Maryland, as a machinist (C. R. 396). That after service at various other posts, he was assigned, in July, 1944, to the Manhattan District Project at Oak Ridge, Tennessee, for two weeks' orientation. That his orientation consisted of his being told that it was a secret project, but he was not told, and did not know, what "the secret" was (C. R. 397). That in August, 1944 he was assigned to the Manhattan Project at Los Alamos (C. R. 398). The keenness of his observation is illustrated by his testimony that not until his wife visited him on November 29, 1944, during a furlough to Albuquerque, did he even know that the project was concerned with the construction of the atom bomb. That he learned this only when his wife told him that Julius Rosenberg had told her—

> "* * * that I was working on the atomic bomb; that was the first I knew of it" (C. R. 399).

Neither he nor his wife testified as to how Julius Rosenberg obtained this information.

He testified that on his wife's visit, she immediately told him that Julius and Ethel Rosenberg wanted him to give information to the Russians. That at first he refused; but after thinking it over until the next morning, he agreed (C. R. 424-425). On cross-examination he stated that he agreed after—

> "I consulted with the memories and voices of my mind" (C. R. 539).

He testified that after his agreement he gave his wife information to memorize, but not to write out, "as to the layout of the Los Alamos atomic project, the buildings, number of people, and stuff like that", and the names of

certain scientists working there, specifying only Oppenheimer, Kistiakowski and Bohr (C. R. 426).

Right here is an example of the "phoniness" of Greenglass' testimony. Assuming he was not "covering up" when he testified that he did not know that the "project" he was working on at Los Alamos was the atomic bomb, until his wife told him that Rosenberg had told her that that was what Greenglass was working on, several questions suggest themselves in connection with Greenglass' testimony at this point. For instance: in what manner was Greenglass, nevertheless, enabled immediately to give his wife information "as to the layout of Los Alamos atomic project, the building, number of people, and stuff like that"? And what kind of useful information as to the layout and buildings was it that his wife could offhand memorize? Did he draw for her, or orally describe, the layout of the Los Alamos atomic project and the buildings? If so, how was he suddenly enabled to say that, "though I have seen these buildings every day for four months I suddenly realize that such a building holds the cyclotron; that another holds the crude uranium; another holds the heavy water; another holds the atomic pile; and each is of such and such an exterior and interior design; and that such and such is their relative location." Further, how, out of the thousands of men employed here, did he suddenly come to realize that one of them was Oppenheimer and one, Kistiakowski, and another, Bohr, and that they were leading atomic scientists? Or did he previously know who and what they were, and simply couldn't imagine what such people could be doing at Los Alamos, until Greenglass was told that Rosenberg said that Greenglass, himself, was working there on the atomic bomb? Or did he dash out and ask someone for all this information, and if so, whom?

Greenglass then testified that on January 1, 1945 he arrived in New York on a fifteen day furlough. That one morning shortly after his arrival, Julius Rosenberg came to Greenglass' house and asked him to write down

formation he had as to the atomic bomb and as to scientists working on it, he having told Rosenberg he was working in connection with Dr. Kistiakowski on the H. E. (high explosive) lens mold. That, accordingly, he made a sketch of a lens mold for Rosenberg and on a separate sheet of paper a description of it, and the next morning gave both to Rosenberg together with a list of scientists (C. R. 428-429). He then testified that Government Exhibit 2 was a replica of such sketch of a lens mold and of the accompanying descriptive sheet of paper and that he had prepared this exhibit "during this trial, yesterday" (C. R. 439-440).[2]

Greenglass then proceeded to make the amazing statement that after he had given Rosenberg the alleged original of Government Exhibit 2, *Rosenberg* gave *him* an oral description of what Greenglass testified—

> "I later found out to be the bomb that was dropped at Hiroshima" (C. R. 491-493).

The prosecutor then asked Greenglass the following question and received the following reply (C. R. 493):

> Q. Could you tell us, as you remember in exactly what words Rosenberg described this type of atom bomb to you? A. He said there was fissionable material at one end of a cube and at the other end of the cube there was a sliding member that was also of fissionable material and when they brought these two together under great pressure, that would be—a nuclear reaction would take place. That is the type of bomb he described.

Nowhere in Greenglass' testimony, nor otherwise in the record, is there the slightest intimation as to how Rosenberg could have gotten a description of the Hiroshima atom bomb approximately six months before that bomb was

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[2] Greenglass' perjury in connection with Government Exhibit 2, as well as in connection with Government Exhibits 6 and 7, two other purported reproductions of sketches of lens molds and descriptive material he allegedly gave to Harry Gold in Los Alamos in June, 1945, will not be discussed here.

exploded at Hiroshima on August 6, 1945 (C. R. 890) and over four months before the first test atomic bomb was exploded at Los Alamos on July 16, 1945 (C. R. 907-908). Nowhere is there any testimony that Rosenberg was ever at Los Alamos or had any other source of information there than Greenglass or if he did, why he should depend on so unqualified a source as Greenglass.

Greenglass then testified that Rosenberg gave him the foregoing so-called "description" of the Hiroshima atom bomb so that Greenglass, on his return to Los Alamos from his furlough, "should know what to look for."

The prosecutor then asked Greenglass the following question and received the following answers:

> Q. After he gave you that description, the Hiroshima type, did you, in ensuing months, gather information concerning the atom bomb? A. I did.
>
> Q. Will you tell us just how you went about that? A. I would usually have access to other points in the project and also I was friendly with a number of people in various parts of the project and whenever a conversation would take place on something I didn't know about I would listen very avidly and question * * * the speakers to clarify what they had said. I would do this surreptitiously so that they wouldn't * * * I would do it so they wouldn't know.
>
> * * * * * * *
>
> Q. Now, in addition to that fact, you yourself were working on various things used in connection with the experimentation used on the atom bomb? A. That is correct.
>
> Q. Such as this high explosive lens? A. High explosive lens molds were made in my shop and I got—as a matter of fact, there were molds used on the atom bomb.
>
> Q. Was it on the basis of this knowledge which you had accumulated over those months that you told Rosenberg you thought you had a pretty good description of the atom bomb itself? A. I did.

Q. Did you at a later time, give to Rosenberg a description of the atom bomb itself? A. I did (C. R. 494-495).

NOTE: Asterisks in the foregoing quotation represent mere objections or argument betwee.. counsel and not omission of any testimony.

Believe it or not, this is the sum total of the prosecutor's direct examination of Greenglass and of Greenglass' testimony as to how between his return to Los Alamos in February, 1945, and his next furlough in New York City in September, 1945, Greenglass, a machinist without any scientific training whatsoever, was able to obtain the highly technical and top secret information which allegedly made it possible for him on his return to New York in September, 1945, to draw for Rosenberg a sketch of a cross-section of the Nagasaki atom bomb, and to write out for him twelve pages of material descriptive of its component elements, their action and interaction and the principles of operation of the bomb itself.

Moreover, cross-examination (C. R. 620-628) failed to disclose the names of any persons at Los Alamos with whom he conversed or whose conversations he overheard except that of a GI named Spindel, whose information was confined to the fact that a man known as Baker at Los Alamos was actually the atomic scientist Bohr (C. R. 620).

Cross-examination also failed to develop any details of such conversations had or overheard, except two puerile and meaningless examples (C. R. 624). Greenglass did testify that he had seen blueprints of the lens molds on which he worked, but that he never had taken any blueprint from the shop (C. R. 617-626). There was no testimony by him that he had ever seen a blueprint of a cross-section of the atom bomb.

Indeed, Greenglass' testimony as to the system of white, red and blue badges used for security purposes at Los Alamos (C. R. 408-409; 618-619) showed that as a wearer

of a blue or red badge he could have had no opportunity of obtaining any more definite information as to the atom bomb itself, as distinguished from the lens mold on which he worked, than the wholly negligible information indicated by his testimony. This is, moreover, confirmed by the testimony of Government witness Colonel Lansdale, Security Officer for the Manhattan Project, as to the stringent security measures in effect at Los Alamos (C. R. 879-889. See particularly C. R. 888-889). Nevertheless, as has been seen, it was solely on the basis of the "information" thus obtained by Greenglass between his return to Los Alamos and his next furlough in New York in September, 1945, that he allegedly was able to tell Rosenberg, who came to see him at his house the morning after his return, that "I think I have a pretty good description of the atom bomb." Rosenberg then said he wanted Greenglass to write up such description immediately and he gave Greenglass $200 (C. R. 490, 495-496).[3]

Greenglass then testified (C. R. 497-498) that thereupon his wife and he had a combination breakfast-lunch, and he then drew a sketch of a cross-section of the Nagasaki atom bomb and wrote out twelve pages of the descriptive material already referred to, which he completed about two o'clock that same afternoon and that he and his wife immediately delivered the sketches and material to Rosenberg at his house.[4]

Greenglass then testified (C. R. 509-513) that Rosenberg said, "This is very good. We ought to have it typed immediately." That thereupon Mrs. Rosenberg did the typ-

[3] The intentional confusion with which Greenglass' testimony in this respect was presented by the prosecutor is well illustrated in the pages intervening between these citations.

[4] At this point a long argument ensued between the Court and various counsel (C. R. 499-510) as a result of which, on motion of defendants' own counsel Government Exhibit 8 was impounded and the stenographer was ultimately directed not to transcribe Greenglass' testimony paraphrasing the twelve pages of descriptive material relating to Exhibit 8 (C. R. 504).

ing, and she, Julius and Mrs. Greenglass corrected the grammar; that it took until about five in the afternoon to complete the typing, and that Rosenberg then took Greenglass' original notes, burned them in a frying-pan and flushed them down the drain (C. R. 514).

There is no precise testimony by Greenglass as to how he was able to produce Exhibit 8 and a paraphrase of the twelve pages of descriptive material relating thereto during the trial, some five years after he allegedly had given the original to Rosenberg in New York in September, 1945, except his answer to a general question asked by the Court (C. R. 611):

> "Let me ask you: these sketches are in evidence, are they the products of your own mind? By that I mean, were you helped by anybody on the outside in drawing those sketches? A. Nobody else, just myself."

This question is broad enough to include Exhibit 8. Other questions as to whether he produced Exhibits 2, 6 and 7, sketches of the lens molds, wholly from memory, and his answer that he did, do not specifically include Exhibit 8 (See C. R. 609; also C. R. 626-627, which may be intended to refer to Exhibit 8, but particularly refers only to Exhibits 2, 6 and 7).

It is submitted that the foregoing analysis of Greenglass' testimony demonstrates that no one, with an I. Q. rating above that of a moron, could fail to recognize that such testimony was inherently incredible. The trouble is that neither on the original trial, nor on the original appeal, nor on the Section 2255 proceedings before the Court of Appeals or earlier before the District Court, has any such analysis been made. Instead, such testimony was permitted by both the Trial Judge and counsel to go before the jury without any such analysis, and in the same undigested and incredible confusion in which it was deliberately presented by the prosecutor.

Moreover, the Trial Judge himself, as will now be shown, precluded defendants' counsel from a potential opportunity

to put before the jury, out of the mouth of the Government's own atomic witness, Colonel Derry, evidence of Greenglass' total lack of capacity to give such testimony.

After Colonel Derry, the liaison officer for General Groves, had been called as an atomic expert and had testified that impounded Government Exhibit 8, which was shown to him, and Greenglass' untranscribed testimony, which was read to him, constituted, respectively, a substantially accurate cross-section of the Nagasaki atom bomb and a substantially accurate description of its component elements and principles of operation (C. R. 914-916), defendants' counsel Mr. Bloch asked him the following questions, with the following absurd ruling by the Court which was heartily supported by the prosecutor, Mr. Saypol (C. R. 916):

> Q. Would you say as a scientist, a graduate engineer who has received college courses and received a degree in engineering, and had the experience you have detailed to us here, that a machinist without any degree in engineering or any scientist (science) would be able to describe accurately the functions of the atom bomb and its component parts——
>
> The Court: Objection sustained.
>
> Q. Both in relation——
>
> Mr. E. H. Bloch: May I finish it?
>
> The Court: Yes.
>
> Q. Both in relation to their independent functions and to their inter-related functions?
>
> The Court: Objection sustained.
>
> Mr. Saypol: I would like the record to show that it is the jury who will judge from Greenglass' testimony; not this witness.
>
> The Court: Yes, we have had a bit of summation right now so we will take that out of the final summation.
>
> Mr. E. H. Bloch: It wasn't intended as summation, your Honor. That is all.

Obviously Mr. Bloch's question was not summation. It was a proper question to direct to an expert atomic witness of the Government itself as to Greenglass' educational capacity to produce the original of Government Exhibit 8 and Greenglass' untranscribed paraphrase of the 12 pages descriptive material relating to that exhibit. The reasonable effect upon the jury was to remove any doubt of Greenglass' capacity in this respect and therefore of the truth of Greenglass' testimony. Though the Court stated the credibility of such testimony was left to the jury, the jury was left without any guidance to the consideration of such credibility, or any real occasion to consider it. This was particularly so because in the Trial Judge's instructions to the jury he did not do, as was his right and duty to do, had he really understood such testimony, to caution, the jury as to the possible incredibility of such testimony. The jury's verdict, therefore, cannot reasonably be assumed to have affirmed the credibility of such testimony and, even if it was so intended, could not be presumed to make the incredible, credible.

Moreover, the Trial Judge's ruling could not have been assigned on appeal as reversible error, since no one could say what Colonel Derry's answer would have been, and whether, therefore, the Court's ruling preventing that answer was merely harmless error so far as defendants were concerned.

This ruling of the Trial Judge preventing Colonel Derry from answering a question of defense counsel on cross-examination is to be distinguished in principle from the situation which would have resulted had the Trial Judge prevented such question by defense counsel to a defense witness on direct examination. In the latter event, it is to be presumed that defense counsel would not have asked the question without knowing that his witness would have given a favorable answer, and could therefore have made an offer of proof that such answer would be favorable, thus precluding the possibility that the Trial Judge by preventing such answer committed merely harmless error.